Supreme Court, U.S.
FILED
SEP 22 1999
OFFICE OF THE CLERK

(2)

No. 99-331

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

Michael Dennis Early, et al.,

Petitioners,

v.

The Toledo Blade Company, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Court of Appeals
Of Lucas County, Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, The Toledo Blade Company (improperly identified by petitioners as "The Toledo Blade") and Blade Communications, Inc. (collectively "The Blade"), respectfully submit this Brief in Opposition to the Petition for Writ of

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[1] Petitioners have erroneously petitioned this Court for a writ of certiorari to the Supreme Court of Ohio, a court which declined to exercise its jurisdiction to review this case. Petitioners seek review of the judgment of the Court of Appeals of Lucas County, Ohio.

Certiorari of Petitioners Michael Dennis Early, et al. [2]

JURISDICTION

The Court lacks Jurisdiction to decide the second question purportedly presented because the court of appeals' affirmance of the summary judgment for defendants on plaintiffs' privacy claims rested on multiple independent and adequate state grounds. *See Coleman v. Thompson,* 501 U.S. 722, 729 (1991).

STATEMENT OF THE CASE

Petitioners are ten unsuccessful plaintiffs who brought nearly forty claims for defamation and invasion of privacy against The Toledo Blade Company, a newspaper publisher. Petitioners seek review of a unanimous court of appeals decision affirming a detailed trial court order granting summary judgment against plaintiffs on each and every one of their claims.

For nearly nine years petitioners pressed their case in the Ohio courts, advancing a profusion of meritless claims based on the publication of a series of articles based largely on the public records of the Internal Affairs Division of the Toledo Police Department. Three of the petitioners advanced

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[2] In the caption to the Petition, "The Toledo Blade" is improperly designated as the sole respondent in this case. Respondents have corrected the caption to reflect the proper name of respondent "The Toledo Blade Company" and have added the signal "et al." in reference to the additional respondent Blade Communications, Inc. Pursuant to Supreme Court Rule 29, respondents' corporate disclosure statement is attached hereto as Exhibit A.

claims for invasion of privacy and the remaining seven petitioners advanced libel claims.

Following exhaustive discovery by plaintiffs, The Blade moved for summary judgment on all of petitioners' claims on multiple, independent state and federal grounds. The trial court devoted years to a painstaking review of the massive record and an analysis of all of petitioners' multitude of claims. The result was an extraordinary 163-page opinion which meticulously addressed each of petitioners' claims and methodically identified the numerous state and federal grounds requiring summary judgment against petitioners on each of them.

The Court of Appeals of Lucas County, Ohio afforded petitioners a second plenary review of their claims. Like the trial court, the court of appeals engaged in a thorough analysis of petitioners' claims, issuing a detailed 58-page opinion. Also like the trial court, the court of appeals unanimously concluded that none of petitioners' claims could survive summary judgment. On March 3, 1999, the Ohio Supreme Court summarily denied petitioners' request for discretionary review.

ARGUMENT

I. THE FIRST QUESTION PRESENTED IS NOT RAISED BY THE RECORD BELOW AND DOES NOT PRESENT AN ISSUE WORTHY OF REVIEW ON A PETITION FOR CERTIORARI.

Petitioners' first question presented asks whether advertisements describing a series of newspaper articles as accurate and fair may be considered in determining whether portions of the series were published with actual malice. This question presupposes a ruling that was never made below, either by the trial court or the court of appeals.

In the trial court, the petitioners introduced evidence of The Blade's advertisements and argued it supported an inference of actual malice warranting a trial on their libel claims. The Blade neither moved to strike any evidence relating to its advertisements nor argued that such evidence could not be considered by the courts below. Likewise, the trial court did not strike or otherwise refuse to consider evidence relating to the advertisements, and neither the trial court nor the court of appeals ruled -- or even suggested -- that such evidence could not or would not be considered in determining whether the petitioners had met their burden of raising a triable issue of actual malice. Indeed, each court manifestly considered the entire record before the trial court on summary judgment.

Quite simply, while neither court below found any merit in any of petitioners' claims, neither court ruled in any way that The Blade's advertisements could be considered in determining whether it had acted with actual malice. Consequently, it is not surprising that petitioners have disregarded the requirement of Supreme Court Rule 14 that a petition for certiorari must specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts...." Sup. Ct. R. 14 (1)(g)(i).

The Reasons for Granting the Writ of Certiorari urged by petitioners, which depart markedly from the question presented, confirm that petitioners' true complaint is not that either of the courts below refused to consider the evidence presented by petitioners, but simply that petitioners are dissatisfied with the well-supported conclusions reached by both of the courts below in finding that the evidence proffered by petitioners was insufficient, as a matter of law, to survive summary judgment on any of their multitudinous claims. *See* Pet. at 8-12. Petitioners' argument that this Court should exercise certiorari jurisdiction consists of little more than a

rehash of factual arguments made below in connection with one of the claims of petitioner George Taylor. Those factual arguments were examined thoroughly by each of the courts below. *Compare* Pet. at 9-12 *with* App. at A77-A85, A207-A211.

Based on detailed analyses of the evidence, both courts below concluded that petitioner Taylor failed to meet his burden of coming forward with evidence sufficient to raise any triable issue of actual malice.[3] In fact, as the trial court noted, petitioner Taylor had gone so far as to concede at deposition that he had no evidence that The Blade reporters either knew the report concerning him was false or that they thought it was false.[4] *See* App. at A81. Thus, the single claim offered by petitioners as illustrative of the alleged error below simply reinforces the conclusion reached by each of the courts below -- namely, that petitioners' claims were singularly lacking in merit.

Finally, even if petitioners could show that their first question were presented by the record below (which they cannot), and even if they could identify some reason to suspect

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[3] *See* App. at A85 (trial court) ("Even looking at the totality of the circumstances, there is insufficient evidence to demonstrate that the aforementioned publication was made with the requisite minimal reckless disregard for the truth."), A210-A211 (court of appeals) ("[T]here is no evidence that the reporter published his statements with knowledge they were false or with reckless disregard regarding whether they were false.").

[4] The record did not even establish that the report in question was inaccurate. There is no support for petitioners' assertion that the record shows that the challenged reports were false or that The Blade's reporters believed them to be false. *See* Pet. at 4. Similar mischaracterizations of the record, to which The Blade respectfully objects, appear throughout the Petition for Writ of Certiorari.

that their claims were wrongly decided below (which they also cannot), they still have not demonstrated why an exercise of this Court's discretionary jurisdiction would be warranted. Petitioners have not attempted to show that the decision below conflicts with any decision by any state court or federal court, nor have they offered any explanation as to how the questions presented bear any of the other earmarks of an issue worthy of consideration on a petition for certiorari. *See* Sup. Ct. R. 10. Rather, petitioners at best present a personal complaint about a ruling in which the courts below applied well-settled law to idiosyncratic facts. The Court has long held that such cases are not appropriate for certiorari review. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). Petitioners' request for a writ of certiorari on the first question presented should therefore be denied.

II. THIS COURT LACKS JURISDICTION TO DECIDE THE SECOND QUESTION PRESENTED BECAUSE SUMMARY JUDGMENT ON PETITIONERS' PRIVACY CLAIMS WAS GRANTED AND AFFIRMED ON MULTIPLE INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

The second question presented purports to challenge the court of appeals' affirmance of summary judgment on petitioners' claims for invasion of privacy by publication of private facts. This Court lacks jurisdiction to review that aspect of the decision below because those claims were disposed of on multiple independent and adequate state law grounds. Specifically, the court of appeals affirmed summary judgment based primarily on the privacy petitioners' failure to satisfy two required elements of their state law claims.

First, because the published information concerning the privacy petitioners was drawn entirely from Ohio public records, the court of appeals held that that the privacy petitioners could not show publication of private facts

concerning them.[5] Second, the court of appeals ruled that the privacy petitioners failed to demonstrate that the information published by The Blade was not of legitimate concern to the public, another required element of their claims under Ohio law.[6] Only after identifying these two independent state law grounds for its ruling did the court of appeals go on to hold that summary judgment also was independently required under the First Amendment principles set forth in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). *Id.* at A244-A245.

This Court has repeatedly held that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman,* 501 U.S. at 729. "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* Because the court of appeals explicitly affirmed summary judgment on all of the privacy petitioners' claims on multiple, independent and adequate state law grounds this Court lacks jurisdiction to review the second question presented.

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[5] *See* App. at A243 ("[T]he trial court did not err when it ruled that the appellants in question failed to prove an essential element of invasion of privacy by publication of private facts: the facts publicized were not private, they were already part of the public record.").

[6] *See* App. at A244 ("[W]e agree with the trial court's conclusion that this information was of legitimate public interest....").

CONCLUSION

Because the first question urged by petitioners is not presented by the record below and, in any event, does not merit an exercise of the Court's certiorari jurisdiction, the Court should deny petitioners' request for a writ of certiorari as to that question. Because the second question presented seeks review of claims that were disposed of below on multiple independent and adequate state grounds, the Court lacks jurisdiction to review that question.

Respectfully submitted,

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EXHIBIT A

Respondent, The Toledo Blade Company, is an operating division of respondent Blade Communications, Inc., a privately-held Ohio corporation. Blade Communications, Inc., has no parent corporation and no publicly-held company owns 10% or more of the corporation's stock.